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No. 92-1937

In The
# Supreme Court of the United States
October Term, 1992

MIGUEL MEDRANO,
*Petitioner*,

*v.*

EXCEL CORPORATION,
*Respondent*.

## REPLY IN SUPPORT OF CERTIORARI

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## REPLY IN SUPPORT OF CERTIORARI

1. In an apparent effort to avoid the fact that this case squarely presents the question whether section 301 of the Labor-Management Relations Act bars a state from providing a cause of action for employees to challenge provisions in a collective bargaining agreement ("CBA") that violate state law, respondent Excel Corporation argues that the CBA did not violate state law, Opp. 12-17, and repeatedly insists that the CBA "has never been held to be unlawful, discriminatory or retaliatory." *Id.* 8-9, 12, 23.

The simple answer to this contention is that Excel had every opportunity to present at trial its factual and legal contentions about the existence of discrimination. Moreover,

if the preemption holding below is reversed, the court of appeals will be able to consider respondent's objections to the sufficiency of the evidence to support the jury's verdict, and any other state law arguments that were properly raised below. The court of appeals did not address those claims, but rather proceeded directly to the preemption question, assuming that the CBA provisions were illegal. The central legal question of preemption -- which would bar a state from proscribing employer discrimination where that discrimination is authorized by a CBA -- is thus squarely presented.[1]

2. Respondent also tries to downplay the significance of the holding below, that states are preempted from providing a cause of action against unlawful CBA provisions, by arguing that CBA's are not insulated from review because their unlawfulness may be raised in a suit under section 301. Opp. 19-21. There are several flaws in this analysis.

First, although there is ample precedent for employers in section 301 cases to **defend** against enforcement of a CBA,

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[1] Because respondent's defense of the legality of its CBA was raised only in its reply brief in the court of appeals, it was not properly preserved. Even if it was preserved, there is no merit to the objection that the CBA is lawful because it provides for discharge upon the settlement, rather than the filing, of a workers compensation claim. An employer may not avoid the ban on discrimination by firing only those workers whose claims **succeed** in obtaining a permanent disability payment, while allowing those employees who do not pursue their claims to a successful conclusion to retain their employment. With respect to respondent's complicated factual hypothetical, under which workers are better off under the CBA provision providing for immediate discharge once they obtain a workers compensation settlement, the question of whether the jury verdict finding discrimination is not supported by sufficient evidence is not before the Court, either in the petition or in a timely cross-petition.

or of an arbitral award enforcing a CBA, on the ground that, as construed, the CBA violates public policy, there is no precedent for an employee to sue under section 301 to enforce a public policy of his state, instead of seeking to enforce the CBA itself. Where it is the state public policy, and not the CBA, that provides the basis for the cause of action, it is hard to see how section 301 could allow an employee to bring the claim in federal court in the first place. Moreover, the notion that a CBA enforcement proceeding may be used to enforce public laws rather than contract provisions ignores the limit on which this Court insisted in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974): where an arbitrator relies upon public law, rather than the CBA, to supply a basis for his decision, the award must be vacated because it fails to draw its essence from the CBA. Reversal of this rule to allow unionized employees to enforce state public policy through the federal courts would work a dramatic increase in both federal jurisdiction and federal regulation of the workplace.

Second, although union negotiating decisions may, as respondent notes, be challenged under the duty of fair representation ("DFR"), Opp. 20, and even if this provided a valid basis for holding the union liable, it would provide no basis for suing the employer, which can only be held liable in a hybrid suit for actions taken in violation of the CBA itself. Moreover, the DFR allows unions a wide range of discretion in serving the collective interest of all members. Unions frequently trade away working conditions or seniority in order to secure better wages or benefits, and vice-versa. It is by no means clear, as a matter of federal law, that a union's decision to consent to discrimination against certain workers compensation recipients in order to secure benefits that, in its judgment, are more important, would be a breach of the DFR.

Third, even if there were some basis for suing employers under section 301 for violating state public policies, where the federal courts deemed it appropriate to incorporate

a given state policy into the fabric of federal labor law, the question would remain why the state police power, which unquestionably authorizes the regulation of the terms and conditions of employment, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754-756 (1978), should be supplanted by a federalized code of regulation. Some substantive federal labor statutes may preempt particular state rules, because they interfere with the particular federal policies advanced by the statute. *E.g.*, *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986). Section 301, however, does not provide a basis for such fine-tuned preemption to support particular policies. If section 301 preemption applies, it extends to any state rule that a particular employer and a particular union may desire to negate. As the Court stated in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985), and as respondent again ignores, section 301 preemption should not be turned into a way for employers and unions to contract out of state laws of which they disapprove.

3. The petition argued for review, in part, based on widely conflicting lower court holdings in three other areas of section 301 preemption -- (1) where the CBA is raised as a defense, but the state claim may nevertheless be able to be decided without reference to the CBA, or the federal defense is resolved under federal law while not preempting the state claim, Pet. 14-15; (2) where the state claim is based on intentional infliction of emotional distress, *id.* 15-16; and (3) where an employee seeks to enforce state anti-discrimination laws. *Id.* 16. *See also Croston v. Burlington Northern Railroad Co.*, 143 LRRM 2702, 2706-2707 (9th Cir. 1993). Respondent objects to this aspect of the petition, arguing that most state law claims are properly being held preempted by section 301 in the lower courts, Opp. 22, and that the conflicts are insignificant because they are "at the outer parameters [sic] of the preemptive field." Opp. 23.

To the contrary, it is our experience that many lower federal courts have taken too broad a view of federal

preemption, and that *Lingle v. Norge*, 486 U.S. 399 (1988), has failed to drive home the proposition that the mere possibility of reference to a CBA is not a sufficient basis for preempting state law. Moreover, the discord in judicial responses to the three kinds of cases mentioned above is produced by the same analytic error that infects the decision below -- the assumption that the need to discuss a CBA provision at all, even if only to determine whether it is illegal, is a sufficient basis to preempt the claim of illegality. Consequently, even though the three other issues are not presented here, because this case turns on the same kind of error that often affects cases involving those issues, those conflicts further support review here.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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